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No. 399

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

DANIEL ROWAN, D.B.A. American Book Service, ET AL.,
Appellants,

v.

UNITED STATES POST OFFICE DEPARTMENT, ET AL.,
Appellees.

On Appeal From the United States District Court for the Central District of California

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BRIEF FOR DIRECT MAIL ADVERTISING ASSOCIATION, INC., AMICUS CURIAE

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BRIEF FOR DIRECT MAIL ADVERTISING ASSOCIATION, INC., AMICUS CURIAE

This brief on behalf of the Direct Mail Advertising Association, Inc. (DMAA), as amicus curiae, is filed with the written consent of both Appellants and Appellees. With 2600 members, DMAA is the largest trade association representing firms involved in advertising by mail. Its members include users of the mail

for advertising purposes (to promote their own goods, services or charitable causes or those of others), creators of mail advertising materials (such as advertising agencies) and suppliers (such as paper and envelope manufacturers).

OPINION BELOW

The opinion of the United States District Court for the Central District of California, which is not yet reported, is printed in the Appendix.

JURISDICTION

The judgment of the United States District Court for the Central District of California was entered on April 30, 1969. Appellants filed a timely notice of appeal and jurisdictional statement pursuant to 28 U.S.C. § 1253, and this Court noted probable jurisdiction on October 27, 1969.

QUESTION PRESENTED

Under review is a decision of a three-judge district court upon summary judgment that Section 301(a) of P.L. 90-206, 39 U.S.C. § 4009, is not unconstitutional on its face. Accordingly, DMAA believes that the question presented is:

> Whether 39 U.S.C. § 4009 is unconstitutional on its face because it bars any administrative or judicial inquiry into the "pandering" character of mail complained of under the statute and thus applies to all types of mailed advertising matter or whether the statute permits such inquiry, and thus applies only to advertisements which could reasonably be considered "pandering," thereby avoiding constitutional infirmities?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following provisions of the Constitution and laws of the United States bear upon the arguments advanced DMAA:

The First Amendment of the Constitution of the United States, which provides in pertinant part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

The Fifth Amendment of the Constitution of the United States, which provides in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

Section 301(a) of P.L. 90-206, 39 U.S.C. § 4009, which is set forth in full at pages 3-5 of the Appellants' brief.

STATEMENT

Section 4009 allows the addressee of a mailed "pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative" to obtain a Prohibitory Order from the Post Office Department directing the sender of that advertisement "to refrain from further mailings of such materials" to that addressee. To insure this cessation of further mailings, the sender upon whom such a Prohibitory Order is served must strike the addressee's name from all mailing lists which he owns, rents or controls. Failure to comply with a Prohibitory Order can bring about an enforcement proceeding in a federal district court by the United States Attorney General and can ultimately result in a contempt citation.

To the best of DMAA's knowledge, none of its members engage in advertising that could in any sense be considered "pandering." Both DMAA's "Business Ethics"[1] and "Operating Standards of Practice"[2] prohibit such advertising. Nonetheless, the Post Office Department has served many Prohibitory Orders under Section 4009 upon DMAA members for advertising such things as The Family Heritage Bible, La Salle Extension University, Business Week Magazine, Illustrated Electronics Course, The Christian Herald's Family Bookshelf, The American Scholar Magazine, The Center for the Study of Democratic Institutions, Roget's International Thesaurus, hospital insurance plans, grocery store weekend specials, tool kits, etc. This experience of DMAA's members indicates that Section 4009 has been indiscriminately employed against all types of advertising.

That upon receipt of a complaint the Post Office automatically issues a Prohibitory Order regardless of the nature of the advertisement is confirmed by the Post Office's own official guide for administering the statute:

> "When determined that the patron has properly done his part . . . the mailing which the patron has characterized as a pandering advertisement must

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[1] Paragraph (D) of the DMAA Business Ethics provides:

> "We will keep our mailings equal to or above the personal standard of decency as presently observed. Immoral, salacious or offensive mailings make enemies for our entire medium."

[2] Paragraph 11 of the DMAA Operating Standards of Practice provides:

> "Mailings will not contain vulgar, immoral, profane or offensive matter nor will members use the mails to promote the sale of gambling devices, pornographic material or other matter not acceptable for mailing on moral grounds."

> be examined to determine if it is, in fact, an advertisement. It is important to emphasize . . . that the only question to be determined . . . with respect to the offending mail piece is whether it constitutes an advertisement. The Department has no authority to review or question the patron's decision that the subject matter of the offending mail piece is erotically arousing or sexually provocative." Post Office Department Publ. No. 125, p. 5 (April, 1968).

While the application of Section 4009—which is entitled "Prohibition of pandering advertisements in the mails"—to advertisements for such things as the Family Heritage Bible, The Center for Study of Democratic Institutions, or tool kits may lead bystanders to smile, in fact it is no laughing matter.

In the first place, to be labeled a "pandering" advertiser when there is no reasonable basis therefor, and particularly to be so labeled by an official order of the United States Government, is an unwarranted smear upon the advertiser and upon the goods, services, or causes his advertisement promotes.

Secondly, compliance with Prohibitory Orders under Section 4009 involves a substantial amount of time, effort and money. For the order requires that a mailer, his agents, or assigns remove the complaining addressee's name from all of his mailing lists, including those which he owns, rents or controls, and that for the indefinite future he engage in no transactions involving mailing lists bearing the addressee's name. This is often a very complicated and expensive process.

To comply with a Prohibitory Order with respect to lists that are owned by the mailer involves varying costs depending upon whether the lists are computerized or manually compiled, as are those of many of the

smaller mailers. In many situations it is virtually impossible to remove a name without engaging in a time consuming visual check. There is even greater expense and complication where lists are leased from others. In such situations the mailer-lessee must insure that every lessor from whom lists are ordered removes the name of a complaining addressee.[3] This perforce involves continuing surveillance by the mailer and by all the lessors with whom he does business.

The Appellants in their affidavits before the district court indicated that the weekly expense of removing prohibited names from lists amounted in some cases to between $150 and $500 (R. 64, 83) and that they had spent thousands of dollars in attempting to comply with Section 4009 (R. 64, 80). Their affidavits also indicated that it can cost more than $5.00 to remove a single name from a mailing list (R. 68, 83). The general experience of DMAA members is that in many instances compliance with a single Prohibitory Order costs many times this amount.

Both because of the stigma attached and the effort and expense involved, DMAA and its members are acutely concerned with the way in which Section 4009 has been indiscriminately applied by the Post Office Department. DMAA accordingly files this brief as amicus curiae to urge that the Post Office has so misconstrued the statute as to impair its constitutionality and to suggest a way in which its constitutionality can be preserved.

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[3] Typically, leased mailing lists remain in the possession of the lessor, who performs the actual mailing function for the lessee. Accordingly, the lessee himself cannot inspect leased lists for compliance with Prohibitory Orders, but must instead rely upon the actions of the lessor. Further, the lessor typically rents the list to many lessees, so that he is faced with the problem of purging his list for one lessee but not for others.

POSITION OF AMICUS DMAA AND INTRODUCTION TO ARGUMENT

This case involves two overlapping rights of mail advertisers—the freedom of speech and press protected by the First Amendment and the "civil right of using the mail for lawful purposes," *Milwaukee Pub. Co.* v. *Burleson,* 255 U.S. 407, 424 (Justice Brandeis dissenting). Section 4009 limits both. Since "grave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever," *Hannegan* v. *Esquire, Inc.,* 327 U.S. 146, 156, this Court can sanction the impediment to the free flow of mail that inheres in Section 4009 only by limiting its application to mailed material as to which Congress had a valid and overriding regulatory purpose.

The key to that purpose is the term "pandering," which appears both in the title of Section 4009 and in the portion of the statute, subsection 4009(a), which defines its scope. Unfortunately, the Post Office Department, which vigorously opposed enactment of Section 4009,[4] has, by issuing Prohibitory Orders without regard to the "pandering" character of the mail complained of, applied the statute as though it allows anyone "on any grounds whosoever" to impair an advertiser's right to use the mails. Thus, the term "pandering" has been read out of the statute and Section 4009 has been made unconstitutionally broad.

This overbreadth can be cured only by giving meaning to the terms of the statute and ensuring by administrative and judicial review that the mail com-

[4] See, Hearing on H.R. 7977 before the Committee on Post Office and Civil Service, U.S. Senate, 90th Cong., 1st Sess., pp. 534-65 (1967).

plained of can reasonably be considered a "pandering advertisement." Thus, DMAA contends that the constitutionality of Section 4009 can be preserved only by requiring the exercise of administrative discretion in the Post Office's enforcement of the statute—an *ex parte* determination prior to the issuance of an order as to whether the challenged materials can reasonably be considered "pandering"—and by allowing mail advertisers, who are called before a federal district court for failure to comply with a Prohibitory Order, to obtain an independent judicial determination of whether their mailed advertising is genuinely "pandering."

I. GRAVE CONSTITUTIONAL QUESTIONS WOULD ARISE FROM HOLDING THAT SECTION 4009 ALLOWS NO ADMINISTRATIVE OR JUDICIAL REVIEW OF THE CHARACTER OF MAIL COMPLAINED OF UNDER THE STATUTE AND THEREFORE APPLIES TO ALL MAILED ADVERTISEMENTS.

A. The Application of Section 4009 Must Conform to the Requirements of the Federal Constitution.

Although the processes of Section 4009 are triggered by a private citizen's complaint about a particular piece of mail, the statute is enforced solely through administrative procedures of the United States Post Office Department and the contempt power of United States District Courts. Plainly, the Constitution does not limit the freedom of addressees to complain about anything that they receive in the mail. But equally plainly the administrative and judicial processes of the federal government that are set in motion by an addressee's complaint are, like all other government actions, subject to the limitations of the Constitution. For there is a vast difference between the action of individuals and civic groups who desire to limit the

flow of offensive material and the intercession of the government to assist such persons:

> "It is one thing for parents and religious organizations to be active and involved [in combating pornography]. It is quite a different matter for the state to become implicated as a censor." *Ginsburg* v. *New York*, 390 U.S. 629, 655 (Mr. Justice Douglas, dissenting).

By enforcing through fines and even jail terms an individual's opposition to the receipt of mailed advertising materials, the federal government becomes thoroughly "implicated" in that person's decision. *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58. *See also, Shelley* v. *Kraemer*, 334 U.S. 1; *Reitman* v. *Mulkey*, 387 U.S. 369. Thus, the actions of federal officials charged with enforcing Section 4009 must conform to applicable constitutional principles.

Similarly, the scope of Section 4009 is not free from the constitutional scrutiny of this Court merely because it deals with advertisements. Admittedly, this Court has in certain contexts allowed local regulation of advertising materials. *Valentine* v. *Chrestensen*, 316 U.S. 52; *Breard* v. *Alexandria*, 341 U.S. 622. But such regulations have pertained to the power of local governments to control the use of streets and sidewalks, a matter of acute local concern. *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147, 152. Federal regulation pertaining to the use of the mails raises far more troublesome questions. Compare *Roth* v. *United States*, 354 U.S. 476, 496-508 (opinion of Mr. Justice Harlan).

Moreover, it has long been clear that the broad pronouncements in cases like *Valentine* disclaiming any

constitutional concern with the regulation of advertising have been rejected both explicitly, *Commarano* v. *United States*, 358 U.S. 498, 514 (Mr. Justice Douglas concurring: the *Valentine* dicta with respect to the regulation of commercial advertising was "casual, almost offhand. And it has not survived reflection.") and implicitly by the many recent decisions of this Court that have applied the protection of the First Amendment both to advertising as such and to other manifestations of commercial speech, *Manual Enterprises Inc.* v. *Day*, 370 U.S. 478, 491-95; *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 265-66; *Time, Inc.* v. *Hill*, 385 U.S. 374, 396-97; *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 617.

Finally, many of the mailed advertising materials that have been subjected to Post Office Prohibitory Orders under Section 4009 pertain to books, magazines, courses of instruction in universities, political programs and the like, which are themselves plainly protected by the First Amendment. See p. 4, *supra*. Advertisements promoting materials such as these must be protected by the First Amendment if those materials are to be sold in the market place of ideas.

B. In View of Its Impact Upon Constitutionally Protected Rights of Free Press, Speech and Use of the Mails' Section 4009 Can Be Upheld Only if It Is Construed as Applying to Mailed Matter That Is in Fact a "Pandering Advertisement."

As noted above, pp. 5-6, an addressee's invocation of Section 4009 does much more than intercept mail at the Post Office. The mailer is compelled to take affirmative (and often complex and costly) action to insure the cessation of further mailings to the addressee by removing his name from any mailing lists owned,

rented, or controlled by the mailer and by avoiding any sale, rental, exchange or other transaction involving mailing lists bearing the name of the addressee.

Because of the effort and expense it inflicts on mailers, Section 4009, if not limited to genuinely "pandering advertisement," invites use of the administrative and judicial processes of the federal government to harry ideologically-oriented mailers. For example, the order issued against the New York Civil Liberties Union for advertising the periodical "Civil Liberties" (See *United States* v. *Cybertype Corporation,* 68 Civ. 3683, S.D.N.Y., Defendant's Ex. 4) was in all likelihood prompted by a desire to harass that organization. A sufficiently large number of such complaints would almost certainly impose prohibitive costs upon the mail advertisement of a political magazine; even a small number of complaints might have the same result if the magazine were financially weak. Compare *Saia* v. *New York,* 334 U.S. 558, 562. This same point was made by Assistant Attorney General Wozencraft in his testimony opposing Section 4009 during Senate consideration of the bill:

> "It is possible that, as a practical matter, if enough people put a sender on their blacklist, they would be putting him to so much expense in doctoring his mailing list that, in effect, he would be deprived of the opportunity to disseminate what might be political ideas, to a degree that the court might find really posed difficulties under the first amendment." Hearings on H.R. 7977 before the Committee on Post Office and Civil Service, U.S. Senate, 90th Cong., 1st Sess., p. 576 (1967).

Even absent such abuse, however, the effort and expense involved in complying with Section 4009 poses an obstacle to the use of the mails that can be justified,

if at all, only by an important government interest. *Lamont* v. *Postmaster General,* 381 U.S. 301.

In *Lamont* the Court struck down a provision of the federal postal laws that required an addressee to respond affirmatively to a communication from the Postmaster General that the addressee desired to receive "communist political propaganda" mail matter. The Court concluded "that the Act . . . is unconstitutional because it requires an official act (*viz.,* returning the reply card) as a limitation on the unfettered exercise of the addressee's First Amendment rights." 381 U.S. at 305. As the concurring Justices pointed out (Mr. Justices Brennan, Goldberg and Harlan), "in the area of First Amendment freedoms, government has the duty to confine itself to the least intrusive regulations which are adequate for the purpose." 381 U.S. at 310.

Thus, the teaching of *Lamont* is that an impediment to the use of the mails—even one which can be overcome by compliance with postal regulatory procedures—is justified only if the regulatory procedures are tailored to deal in a precise and narrow manner with a legitimate legislative interest.

This rule is merely an application of a more general principle that governs the propriety of government action affecting First Amendment freedoms:

> "An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order. In this sensitive field, the State may not employ 'means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' "

Carroll v. *President & Comm'rs of Princess Anne,* 393 U.S. 175, 183-84. See also *Shelton* v. *Tucker,* 364 U.S. 479, 488; *NAACP* v. *Button,* 371 U.S. 415, 437-38, 444; *Stanley* v. *Georgia,* 394 U.S. 557, 563.

Section 4009 as now applied by the Post Office Department does not meet this requirement. For there is no legitimate government interest that justifies inflicting on all mail advertisers the effort and expense required for compliance with Section 4009 to protect addresses from unwanted mail regardless of its nature.

It is true that the majority below, against the well-reasoned argument of Judge Hufstedler's concurring opinion, rested its decision in large measure upon an assumed government interest in protecting the "privacy" of the home against such mail. But, in fact, no "privacy" interest is protected by Section 4009, as that term has been used in the recent landmark decisions of this Court.

"Privacy" in *Griswold* v. *Connecticut,* 381 U.S. 479, *Time, Inc.* v. *Hill,* 385 U.S. 374, Mr. Justice Brandeis' dissent in *Olmstead* v. *United States,* 277 U.S. 438, 478, and other cases decided under the Fourth and Fifth Amendments has to do with protecting the individual in his home or elsewhere from the prying eyes of the State or unauthorized persons. "Privacy, thus, is control over knowledge about oneself. * * * It [is] . . . that aspect of social order by which persons control access to information about themselves." Fried, *Privacy,* 77 Yale L.J. 475, 483, 493 (1968).

The protection which Section 4009 affords addressees of mail in no way concerns the exposure of information which they wish to keep private. Instead, Section 4009 prevents certain kinds of information from reaching addressees.

It has never been held that there is a constitutional protection equivalent to that afforded "privacy" which allows persons to shut themselves off from all unwanted communications. It has been urged, in dissent, that the right of privacy "is, simply stated, the right to be let alone; to live one's life as one chooses, free from assault, intrusion or invasion except as they can be justified by the clear needs of community living under a government of law." *Time, Inc.* v. *Hill, supra* at 413 (dissenting opinion). But this Court has rejected the imposition of such a burden upon the person who trys to reach others with his ideas:

> "Exposure of self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press." *Time, Inc.* v. *Hill, supra* at 388.

Moreover, it has been expressly held that the receipt of unwanted mail is not something that can be barred by the invocation of a constitutional protection of "privacy." *Lamont* v. *Comm'r of Motor Vehicles,* 269 F. Supp. 880, 883 (S.D.N.Y., Frankel, D.J.), *aff'd per curiam,* 386 F.2d 449 (2d Cir. 1967):

> "There is no captive quality in the plight of which plaintiff complains. The mail box, however noxious its advertising contents often seem to judges as well as other people, is hardly the kind of enclave that requires constitutional defense to protect 'the privacies of life.' The short, though regular, journey from mailbox to trash can—for the contents of which the State chooses to pay the freight when it facilitates the distribution of trash —is an acceptable burden, at least so far as the Constitution is concerned. And the bells at the door and on the telephone, though their ring is a more imperious nuisance than the mailman's ti-

dings, accomplish more peripheral assaults than the blair of an inescapable radio."

Rather than pertaining to "privacy," the congressional purpose underlying Section 4009 is similar to that involved in cases such as *Breard* v. *Alexandria,* 341 U.S. 622, *Kovacs* v. *Cooper,* 336 U.S. 77, and *Saia* v. *New York,* 334 U.S. 558, which dealt respectively with door-to-door solicitation, sound trucks on public streets, and sound systems in public parks. These cases make it abundantly clear that the government cannot guarantee its citizens an absolute right to serenity against all those who try to reach them with ideas:

> "This case calls for an adjustment of constitutional rights in the light of the particular living conditions of the time and place. Everyone cannot have his own way and each must yield something to the reasonable satisfaction of the needs of all." *Breard* v. *Alexandria, supra* at 626.

Thus, in *Breard* it was held that a city could reasonably restrict door-to-door solicitation since, quoting Zachariah Chafee, "of all the methods of spreading unpopular ideas, this [house-to-house canvassing] seems the least entitled to extensive protection." 341 U.S. at 639, n. 27. But see *Martin* v. *Struthers,* 319 U. S. 141.[5] Moreover, the Court in *Breard* noted that

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[5] In *Martin* v. *Struthers,* 319 U.S. 141, the Court, while striking down a general prohibition against door-to-door solicitation, did suggest that a statutory scheme which allowed individuals to exclude solicitors would not be unconstitutional. 319 U.S. at 147-48. However, the means suggested by the Court for accomplishing this exclusion would not have entailed anything like the effort and costs involved in a mailer's compliance with Section 4009. Moreover, the interest in *Martin* in keeping out solicitors, was much more like the conventional "privacy" interest discussed above, p. 13, than the interest underlying Section 4009, for exposure at the doorway of the home to a solicitor can reveal information which the homeowner desires to keep to himself.

"the usual methods of solicitation—radio, periodicals, *mail,* local agencies—are open." 341 U.S. at 631-32. (emphasis added). And in *Kovacs* it was held not unreasonable for a city to pass an ordinance forbidding the use of sound trucks that if unregulated would have disturbed the living and working habits of the town's citizens. The decision in *Saia,* on the other hand, which struck down an ordinance allowing police regulation of a sound system in a public park, can be best reconciled with *Kovacs* by the principle of reasonableness—it being less of an intrusion to subject unwilling listeners in parks to a loudspeaker than listeners in their homes. *Cf. Public Utilities Commission* v. *Pollak,* 343 U.S. 451.[6]

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[6] The drafters of the Restatement of Torts, Second, have recognized an individual's interest in avoiding "intrusion upon his seclusion," as a conceptually distinct aspect of the right to recover for "interference with privacy," A.L.I. Restatement of the Law, Second, Torts, Tentative Draft No. 13, pp. 100-107 (April 27, 1967), only in the following circumstances:

> "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another, or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, *if the intrusion would be highly offensive to a reasonable man.*" *Id.* at 103. (emphasis added).

The cases upon which the drafters of the Restatement rely all declare that the intrusion must be one which by the standard of a reasonable man would be deemed offensive. See, *e.g.,* Harms v. Miami Daily News, Inc., 127 So.2d 715, 718 (Fla. D.C.A. 1961):

> "In determining the extent of the right of privacy, the standard by which the right is measured is based upon a concept of the man of reasonable sensibility; the hypersensitive individual will not be protected."

See also, Carey v. Statewide Finance Co., 223 A.2d 405, 407 (Conn. C.C. 1966); Horstman v. Newman, 291 S.W.2d 567 (Ky. 1956); Housh v. Peth, 133 N.E.2d 340 (Ohio 1956).

Section 4009 can be upheld under the standard of reasonableness only if it is limited to protecting unwilling persons from bona fide "pandering advertising." For only by preventing the delivery of such advertisements, which inevitably "tend to force public confrontation with the potentially offensive aspects of the work," *Ginzburg* v. *United States,* 383 U.S. 463, 470, see also *Redrup* v. *New York,* 386 U.S. 767, 769, can such persons be spared a confrontation that they might reasonably find highly offensive, it being necessary to read or inspect an advertisement to discern its contents. Mail advertisers can therefore be required to make a reasonable accommodation to the interest of persons who wish to avoid exposure to such advertising.

But persons who object to mail advertising that cannot reasonably be held to cause an offensive confrontation must, rather than imposing effort and expense on mailers of such advertising, themselves make an accommodation. They must make "the short, though regular, journey from mailbox to trash can" (a trip they must at some point make for non-advertising mail as well) to adjust for the rights of mail advertisers to use the mails and enjoy the freedom of speech and press guaranteed by the First Amendment.

In the context of Section 4009, this adjustment in rights between the unwilling addressee and the mail advertiser can be made only by an independent review that is sufficient to insure the statute's application solely to mailers engaged in pandering advertising.

C. Other Constitutional Considerations Require an Independent Administrative and Judicial Determination of the "Pandering" Character of Materials Complained of Under Section 4009.

1. The Need To Establish the Mailer's Scienter.

Since Section 4009 requires the mailer, his agents, and assigns to remove a complaining addressee's name from all mailing lists and to avoid any transactions in mailing lists bearing such addressee's name—thereby imposing substantial effort and expense upon the mailer—it can be applied only to mailers who can reasonably be held to have known the "pandering" character of their materials. *Manual Enterprises, Inc.* v. *Day,* 370 U.S. 478.

In that case the Government contended that it was not required to establish *scienter* against a magazine publisher whose advertisers allegedly purveyed obscene materials, since the obscene-advertising statute before the Court involved a civil sanction impeding the flow of mail, not criminal punishment. Mr. Justice Harlan in his opinion announcing the judgment of the Court flatly rejected that contention:

> "In the constitutional climate in which this statute finds itself, we should hesitate to attribute to Congress a purpose to render a publisher civilly responsible for the innocuous advertisements of the materials of others, in the absence of any showing that he knew that the character of such materials was offensive . . . . [W]e should be slow to accept the suggestion that an element of proof expressly required in a criminal proceeding may be omitted in an altogether parallel civil proceeding . . . . [A] substantial constitutional question would arise were we to construe § 1461 as not requiring proof of *scienter* in civil proceedings." 370 U.S. at 492.

Mr. Justice Brennan in his concurring opinion for three other members of the Court agreed that among the questions that "loom large in the wake of an order such as the one before us" is "whether Congress can close the mails to obscenity by any means other than prosecution of its sender." 370 U.S. at 497-98. Accordingly, a majority of the Court in *Manual Enterprises* held that a grave constitutional question would be presented were the statute then before it to be construed as not requiring *scienter*.

The teaching of *Manual Enterprises* as it applies here is that Congress cannot have been assumed in the absence of the clearest statutory language and history to have contemplated that Section 4009 would be made applicable to a mailer who had no basis for believing he was engaged in "pandering advertisement." No mailer can be reasonably charged with knowledge that an addressee will find an advertisement for The American Scholar Magazine or for the grocery store weekend special erotically stimulating. But without an administrative and judicial determination as to the actual character of materials challenged under the statute, that is precisely its effect.[7]

2. The Need To Limit the Stigma Associated With Application of the Statute.

It is gravely serious for a mailer, particularly a small businessman who may be unsophisticated in the ways of the law, to receive an official order from the United States Post Office Department that in accordance with

[7] In light of the fact that a Prohibitory Order does not in itself involve sanctions for non-compliance, it should not be difficult for purposes of pre-order administrative review to impute *scienter* to the mailer on the basis of the character of the mail complained of.

the terms of a federal statute he is a panderer. Yet under Section 4009 as it has been applied by the Post Office Department literally hundreds, if not thousands, of persons who are engaged in mail advertising that under no reasonable view could be described as pandering have been so branded.

This application of Section 4009 constitutes a flagrant example of castigation of innocent people by the "arbitrary fiat" of the executive branch. See *Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, 143 (Mr. Justice Black concurring). Indeed, Section 4009 as applied by the Post Office Department, like the notorious Act of Attainder of James II, invites anyone for any reason to invoke federal administrative and judicial processes in order to impose penalties upon mail advertisers. *Id.* at 146-49 (Appendix to concurring opinion of Mr. Justice Black). See also *United States* v. *Brown*, 381 U.S. 437, 448. This noxious aspect of Section 4009 can be avoided only by holding that an addressee's invocation of the statute is subject to meaningful judicial and administrative review.

3. The Need To Limit the Delegation of Censorship Power to Individual Addressees.

Section 4009 as now applied by the Post Office Department constitutes a do-it-yourself censorship scheme that can be invoked by anyone for any purpose against any mailed advertisement. This unfettered discretion turns the regulatory scheme into one very close to that disapproved in *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, which dealt with a delegation of censorship power to a commission of private citizens. Since the exercise of this power was committed to the discre-

tion of these citizens and was subject neither to supervision nor to administrative or judicial review, the scheme was held to violate the First Amendment rights of book sellers and others whose activities were censored. See also, *Cox* v. *Louisiana*, 379 U.S. 536; *Saia* v. *New York*, 334 U.S. 558; *Cantwell* v. *Connecticut*, 310 U.S. 296.

Only by limiting the addressee's discretion in the manner suggested here—appropriate administrative and judicial inquiry into the actual "pandering" character of mail materials—can this defect in the statute as now applied be cured.

D. To Avoid an Unconstitutional Chilling Effect on the Use of the Mails, the Postmaster General Must, Prior to Issuing a Prohibitory Order, Determine Whether the Material Complained of Can Reasonably Be Considered a Pandering Advertisement.

As shown by its official guidelines, pp. 4-5, *supra*, the Post Office Department already makes pre-order determinations as to whether mail complained of under Section 4009 is an "advertisement." A similar determination as to the "pandering" character of the materials complained of under the statute is constitutionally required.

No proper purpose can be served by the issuance of unenforceable Prohibitory Orders. Indeed, unless the issuance of a Prohibitory Order is preceded by a Post Office determination that materials complained of are prima facie "pandering advertisements," the issuance of the order will have a needlessly inhibiting and chilling effect upon a mailer's First Amendment freedoms. *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58.

In *Sullivan* it was urged, on behalf of a Commission which had merely promulgated public notice of the "objectionable" nature of particular publications, that the "Commission . . . does not regulate or suppress obscenity but simply exhorts book sellers and advises them of their legal rights" 372 U.S. at 66. This Court rejected that argument:

> "This contention, premised on the Commission's want of power to apply formal legal sanctions, is untenable . . . .
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> * * *
>
> "It is true, as noted by the Supreme Court of Rhode Island, that Silverstein was 'free' to ignore the Commission's notices, in the sense that his refusal to 'cooperate' would have violated no law. But it was found as a fact—and the finding, being amply supported by the record, binds us—that Silverstein's compliance with the Commission's directives was not voluntary. People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around, and Silverstein's reaction, according to uncontroverted testimony, was no exception to this general rule. The Commission's notices, phrased virtually as orders, reasonably understood to be such by the distributor, invariably followed up by police visitations, in fact stopped the circulation of the listed publications *ex proprio vigore*." 372 U.S. at 66-68.

The chilling effect of Prohibitory Orders is not lessened by the opportunity for the post-order administrative hearing provided by Section 4009(d). Such hearings would be costly to the mailer, often more costly than compliance with Prohibitory Orders. On the other hand, the exercise of the Post Office pre-order prose-

cutorial discretion, urged here, could be accomplished in an informal, *ex parte* manner, requiring only an inspection of the materials complained of by the addressee.[8]

The Post Office Department should have little difficulty in applying the statute in this manner. The guide to identifying "pandering advertisements," as the terms of Section 4009 and its legislative history show, pp. 27-28, 32-33, *infra*, is this Court's discussion of the meaning of "pandering advertising" in *Ginzburg* v. *United States*:

> "[T]he sordid business of pandering—'the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers.'" 383 U.S. at 467.
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> * * *
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> "The 'leer of the sensualist' also permeates the advertising for the three publications." *Id.* at 468.
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> * * *
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> "The deliberate representation of petitioners' publications as erotically arousing, for example, stimulated the reader to accept them as prurient . . . . [T]he purveyor's sole emphasis is on the sexually provocative aspect of his publications . . . ." *Id.* at 470.
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> * * *
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> "[The publishers] deliberately emphasized the sexually provcative aspects of the work, in order to catch the salaciously disposed." *Id.* at 472.

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[8] Such prosecutorial discretion is consistent with the statute. See pp. 29-30, *infra*. By the same token, this informal inspection of mailed materials would not run counter to the wishes of those congressmen who desired to avoid lengthy administrative proceedings under the Act.

See also, *Memoirs* v. *Massachusetts,* 383 U.S. 413, 420-21; *Redrup* v. *New York,* 386 U.S. 767, 769; *Ginsburg* v. *New York,* 390 U.S. 629, 674 (Mr. Justice Fortas dissenting).[9]

E. The Strong Presumption of Judicial Review of Administrative Action and the Mandates of Due Process Require That Courts Which Are Asked to Enforce Section 4009 Make an Independent Determination That Prohibitory Orders Are Based Upon Genuinely "Pandering Advertisements."

Federal courts have an inherent right to inquire into the propriety of administrative orders that they are asked to enforce, since in an enforcement proceeding the court itself becomes affirmatively involved in the judgment of the administrative agency (and in this case in the judgment of the addressee as well):

> "The decree, when entered, is a judicial order . . . . The interposition of the judiciary as the enforcing agency must have some meaning . . . .
>
> "The Board was not given enforcement power; that power was lodged in the courts as a judicial function. Its exercise is not merely mechanical." *NLRB* v. *Eanet,* 179 F.2d 15, 20-21 (D.C. Cir. 1949).

A federal court that is asked to enforce a Prohibitory Order under Section 4009 must therefore inquire into the "pandering" nature of the mailed materials before

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[9] An even more detailed definition of "pandering advertisement" could be derived from the President's Commission on Obscenity and Pornography, July, 1969 Progress Report (pp. 15-16), which concerns a proposed method for identifying sexually-related offensive mailed material for purposes of requiring a mark on envelopes containing such material and sets forth a detailed definition of "offensive sexual material."

issuing an injunction against further mailings of the materials or finding a mailer in contempt.

Additionally, any claim for conclusivity of an addressee or Post Office determination under Section 4009 must overcome the strong presumption favoring judicial review of administrative orders, grounded in the due process clause of the Fifth Amendment, that has been developed in a long series of this Court's decisions. The capstone of the trend towards "tolerance of judicial review [that has become] more and more the rule as against the claim of administrative finality," *Union Pac. R.R.* v. *Price,* 360 U.S. 601, 619 (Mr. Justice Douglas, dissenting), is this Court's decision in *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 139-41:

> "The first question we consider is whether Congress by the . . . Act intended to forbid pre-enforcement review of this sort of regulation promulgated by the Commissioner. The question is phrased in terms of 'prohibition' rather than 'authorization' because a survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress . . . . [O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review."

See also *United States* v. *ICC,* 337 U.S. 426, 433-35; *Board of Governors* v. *Agnew,* 329 U.S. 441, 444.[10]

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[10] The Court has acted upon this presumption favoring judicial review in many ways. It has in some cases disregarded rather clear evidence of legislative intent to preclude review. Leedom v. Kyne, 358 U.S. 184; *Id.* at 191-95 (dissenting opinion). In other cases, it has relied upon Article III courts' inherent powers to give the relief demanded by the administrative decision under review. Stark v. Wickard, 321 U.S. 288, 310; Shields v. Utah I.C.R.R.,

Since, as will be shown below pp. 30-31, 39, *infra*, there is no "clear and convincing evidence" of a congressional intent to preclude a judicial determination of the nature of materials complained of under Section 4009, the rule of *Gardner* and similar cases requires a construction of the statute that allows for such review.

Moreover, even where the statute explicitly precludes judicial review, this Court has recognized the right to such review. *Oestereich* v. *Selective Service Board*, 393 U.S. 233. In that case it was held that, notwithstanding clear statutory language to the contrary, the plaintiff had a right to pre-induction judicial review as to whether his statutorily-granted draft exemption had been properly applied by the Selective Service Board. In the present case the same scope of judicial review is required—an independent judicial application of Section 4009(a) to determine under that section whether the Prohibitory Order is based on a "pandering advertisement."

While this review must be meaningful, it is not likely to involve the courts in extensive litigation as to the meaning and application of the phrase "pandering advertisement." They would be justified in granting some deference to the Postmaster General's determi-

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305 U.S. 177; Lane v. Hoglund, 244 U.S. 174. And in other cases the Court has held that provisions for the finality of administrative decisions do not foreclose all judicial review. Harmon v. Brucker, 355 U.S. 579; United States v. California Eastern Line, 348 U.S. 351; Shaughnessy v. Pedreiro, 349 U.S. 48; Dickinson v. United States, 346 U.S. 389. In fact, there is "not a single case upholding unreviewability [of administrative action that] is an entirely satisfactory authority in support of the idea that due process permits the denial of review . . . when the party seeking review is resisting enforcement of a legal obligation." 4 Davis, ADMINISTRATIVE LAW § 28.19, at 106.

nation, as evidenced by his issuance of a Prohibitory Order, that a particular piece of advertising can reasonably be considered "pandering" in nature. The kind of careful review that has been necessary in obscenity cases where criminal punishment was being meted out or where a total prohibition on the use of the mails was at issue would not be needed, so long as the Postmaster General did in fact rely upon some objective evidence of pandering to support his order.

II. THE LEGISLATIVE INTENT UNDERLYING SECTION 4009, AS REFLECTED IN ITS TERMS AND LEGISLATIVE HISTORY, PERMITS THE ADMINISTRATIVE AND JUDICIAL REVIEW THAT IS CONSTITUTIONALLY REQUIRED TO NARROW THE APPLICATION OF THE STATUTE TO OBJECTIVELY DETERMINED "PANDERING ADVERTISEMENTS."

To avoid the grave constitutional doubts that would otherwise arise, this Court should construe Section 4009 as allowing judicial and administrative review of whether an advertisement is in fact "pandering," absent the clearest and most unambiguous articulation of congressional intent to the contrary. See *Machinists* v. *Street,* 367 U.S. 740, 749-50; *Lynch* v. *Overholser,* 369 U.S. 705, 710-11; *Watts* v. *United States,* 394 U.S. 705. Neither the language of the statute nor its legislative history evidences a clear congressional intent to ban such review or to make the statute applicable to all mail advertising regardless of its nature.

A. Section 4009 on Its Face Applies Only to Pandering Advertisements and Does Not Preclude an Administrative or Judicial Review as to Whether a Particular Advertisement Is in Fact Pandering.

1. The Statute Applies Only to Pandering Advertisements.

Section 4009 is entitled "Prohibition of Pandering Advertisements in the Mails." Section 4009(a), which defines the scope of the statute, makes it applicable

solely to persons who are responsible for mailing "pandering advertisements." Thus, the plain purpose underlying Section 4009 was to prevent the receipt of sexually-related advertising that might force an offensive confrontation on unwilling citizens. *Ginzburg* v. *United States, supra* at 470; *Redrup* v. *New York, supra* at 769. See p. 17, *supra*.

Had Congress intended Section 4009 to serve a broader (and DMAA believes in the context of this type of regulation, an unconstitutional) purpose,—*i.e.*, to allow recipients to bar *any* unwanted mail from their homes—the term "pandering" would not have been employed.[11] In applying Section 4009 the Post Office has done what Congress failed to do: it has read the term "pandering" out of the statute.

2. The Addressee's Discretion Does Not Control the Characterization To Be Given the Advertisement.

Subsection (a) of Section 4009 provides:

> "Whoever . . . mails or causes to be mailed any pandering advertisement which offers for sale *matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative* shall be subject to an order of the Postmaster General to refrain from further mailings of such materials to designated addressees thereof." (emphasis added).

On its face this language indicates that the "sole discretion" afforded to the addressee by Section 4009(a) relates to whether the matter which is offered for sale, rather than the advertisement itself, is erotically

[11] Indeed, it was suggested in the hearings on Section 4009 that the term "pandering" should be removed if the statute were intended to apply to all mailed advertising. See p. 38, *infra*.

arousing or sexually provocative.[12] It thereby insures that the addressee cannot be compelled in subsequent administrative and judicial proceedings under the statute to justify his complaint against the matter offered for sale. Along the same lines, this provision in the statute may protect addressees from civil liability in lawsuits brought by outraged mailers for abuse of process or malicious prosecution.

Although subsection (a) standing alone is unambiguous, subsection (b) introduces considerable confusion by referring to the addressee's notice to the Post Office that "he has received such mail matter." Use of the word "received" implies that the advertisement itself is the referent for the addressee's discretion, but the use of the phrase "such mail matter" relates back to the reference in subsection (a) to the "matter" offered for sale, not the advertisement.

The Post Office has resolved these ambiguities in subsection (b) by applying Section 4009 to all mailed advertising. This renders subsection (a) virtually meaningless, for it has the effect of reading out of subsection (a) the term "pandering."

3. The Statute Does Not Bar Administrative or Judicial Review.

There is nothing in Section 4009 that prevents the Postmaster General from making an independent judgment as to whether a particular piece of mailed matter

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[12] An advertisement for material which is arousing or provocative is not per se a "pandering advertisement." For example, an arousing, and indeed an obscene book with an innocent title could be offerred for sale in a form resembling the so-called "tombstone" advertisements in the financial pages. Compare, President's Commission on Obscenity and Pornography, Progress Report, July, 1969, p. 19.

is a "pandering advertisement." It is true that subsection (b) states that the "Postmaster General shall issue an order, if requested by the addressee." However, subsection (d) provides that "if the Postmaster General . . . determines that the order given has been or is being violated, he is *authorized* to request the Attorney General to make application, and the Attorney General is *authorized* to make application, to a district court of the United States for an order directing compliance." (emphasis added). The term "authorized" was carefully chosen by the sponsor of the bill from which this portion of Section 4009 was taken verbatim to insure that the Postmaster General had discretion not to initiate enforcement action for those materials which he believed were not, in fact, "pandering advertisements." See pp. 33-34, *infra.* That being the case, it cannot be held that Congress in subsection (b) directed the Postmaster to serve Prohibitory Orders for all material complained of under the statute. Plainly, no purpose would be served by requiring the issuance of unenforceable orders against non-pandering materials; equally plainly such orders would have a needlessly chilling effect upon the use of the mails. See pp. 21-22, *supra.*

Finally, subsection (e) merely vests jurisdiction in federal district courts to order compliance, and neither in terms nor by implication states that those courts may not make the basic determination required by subsection (a) as to whether the Prohibitory Order which the court is asked to enforce is based on a genuinely "pandering advertisement." Thus, there is not that "persuasive reason" nor "clear and convincing evidence" that is necessary to overcome the strong presumption of judicial review as to the char-

acter of the advertisement. *Abbott Laboratories* v. *Gardner, supra* at 139-41.[13]

Accordingly, a reasonable construction of Section 4009 is that its sanctions do not apply to mailers of non-pandering advertisements and that administrative and judicial review is available to so limit the section's application. Certainly in view of the grave constitutional doubt that would surround Section 4009 if construed as applying to all mailed advertisements, it must be concluded that the statute does not speak with such clarity as to require that interpretation.

B. The Legislative History of Section 4009 Does Not Compel the Conclusion That the Statute Was Intended to Bar an Independent Determination of the Pandering Character of the Advertisement.

A review of the legislative history underlying Section 4009 reveals three salient facts:

(1) Congress was concerned with allowing recipients of mail to bar from their homes sexually-oriented mailed material that could cause an offensive confrontation and was not addressing itself to the quite different question of whether there could or should be some control over mail advertising in general.

(2) There was no congressional concensus that Section 4009 either barred or required the kind of admin-

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[13] Subsection (h) of the statute, which expressly makes Title 5, Chapter 7 of Part I of the United States Code inapplicable to Section 4009 proceedings does not manifest any congressional intent to limit judicial review in enforcement proceedings. That portion of the statute can be properly understood only as reading upon a mailer's right to originate judicial review of a Post Office Prohibitory Order; it in no way limits the defenses that a mailer can raise in a judicial enforcement proceeding originated by the Attorney General.

istrative and judicial review urged here; on the contrary, there was dispute on this point even among the drafters of the legislation.

(3) To the extent that some members of Congress believed that Section 4009 gave recipients of mail unreviewable discretion to bar any mailed advertisements from their homes, they considered that such discretion was necessary to preserve the constitutionality of Section 4009.

Since, as shown above, reviewability of the "pandering" character of the advertisement strengthens the statute's constitutionality, the desire of Congress to provide a constitutional means whereby genuinely "pandering advertisements" could be kept from unwilling recipients would be served by limiting Section 4009 to such materials. And certainly since such a construction of the statute is necessary to avoid doubts about its constitutionality, no valid congressional purpose prevents so limiting the statute.

Section 4009 originated in two separate bills introduced in the first session of the 90th Congress: H.R. 426, sponsored by Congressman Cunningham, and H.R. 8215, sponsored by Congressman Olsen. The comments of both Congressmen make clear that the sole purpose of their bills was to deal with sexually related materials that might cause offensive confrontations. Congressman Cunningham said, for example:

> "My proposal doesn't violate any constitutional provision. As a matter of fact, in the *Ginzburg* case, Ginzburg was convicted because of the advertising that was sent into the homes, millions of pieces, and that is what I am talking about—unsolicited advertising of this type." Hearings on H.R. 426 and H.R. 8215 before the Subcommittee

on Postal Operations of the Committee on Post Office and Civil Service, U.S. House of Representatives, 90th Cong., 1st Sess., p. 5 (1967) (hereafter "House Hearings").

Congressman Olsen had precisely the same intent:

> "This bill is rooted in the *Ginzburg* case . . . . Its aim is to protect my home and yours against unsolicited, unwanted pandering advertising . . . .
> "[I]t is about time that something is done to halt this infliction of sexual advertising upon a protesting and objecting population and the saturation of our children with sexual fantasy during their adolescence. House Hearings p. 10.

Congressmen Olsen and Cunningham also believed that their bills provided for an administrative determination within the Post Office Department as to whether or not a particular piece of mail complained of by an addressee was in fact sexually oriented in nature. The Olsen bill, which required a prior finding by the Postmaster General of the pandering character of materials, on its face provided for such an administrative determination. The Cunningham bill did not expressly provide for such a review and was opposed by the Post Office Department for that reason. House Hearings pp. 12-19, 61-63. However, Congressman Cunningham disagreed with the Post Office Department's interpretation of his bill:

> "Right at this time, I should point out that this is not the entirely antomatic legislation that passed the last two Congresses. The language reads that 'the Postmaster General, after appropriate hearings, if requested by the sender, and without a hearing if such a hearing is not requested, thereafter determines that the notice given is authorized.' This is not entirely automatic. The Post-

> master General can use his discretion. The Postmaster General has tools given to him by this bill to use in this field. If he doesn't think the mail matter is within the intent of Congress, he doesn't have to proceed. I hope that you will read that portion of my bill." House Hearings p. 18.[14]

Section 4009 as reported out of the House Committee was a combination of the Olsen and Cunningham bills in that subsections (a) and (b) adopted verbatim the corresponding provisions of the Olsen bill, but the provisions for enforcement relied upon the Cunningham bill's provision for injunctive actions brought by the Attorney General in United States District Courts. H. R. Rep. No. 722, Committee of the Whole House on the State of the Union, U.S. House of Representatives, 90th Cong., 1st Sess., p. 70 (1967). The Committee's report reflected the sentiments of Congressmen Cunningham and Olsen, stating that "this legis-

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[14] The language that Congressman Cunningham read from his bill does not correspond precisely with the language of that bill, in that the bill itself provided that the Postmaster General was "authorized" to request the Attorney General to make application to a district court if "the notice given under subsection (a) has been or is being violated." The disparity between the language as read in the record of the House hearings and the language as it appears in the bill may be due either to an error in transcription at the hearings or to Congressman Cunningham's error in reading the language of this bill into the record. However, the quotation above indicates that Congressman Cunningham placed primary reliance in interpreting his bill on the word "authorized" and believed that this provision gave the Postmaster discretion in enforcing the act. Since Section 4009 (d) embodies the same phrase as Congressman Cunningham's bill—"If the Post Master General . . . determines that the order given has been or is being violated, he is authorized to request the Attorney General to make application . . . to a District Court of the United States . . . ."—Congressman Cunningham's intent with respect to administrative discretion in enforcing his bill is fully applicable to Section 4009 as passed.

lation is phrased in keeping with the *Ginzburg* case to cover only that advertising matter which is intended for commercial exploitation of sexually provocative matters." *Id.* at 69.

Subsections (a), (b), and (c) of Section 4009 as reported to the House were modified pursuant to an amendment offered on the floor by Congressman Waldie. Prior to the amendment, subsection (b) provided that "upon receipt of notice from an addressee that he has received mail matter, determined by the Postmaster General to be of the character of a pandering advertisement, the Postmaster General shall issue an order . . . ." Although the point was not developed in the House hearings, this provision was susceptible of a construction that it required a determination by the Postmaster General of the pandering character of particular advertisements *before* an addressee could complain about the receipt of such an advertisement. This construction of the statute would have presented problems of Post Office censorship akin to those involved in *Lamont* v. *Postmaster General, supra.*

It was Congressman Waldie's concern solely with the Post Office Department's possible censorship role that prompted his amendment; he did not suggest that his amendment was designed to limit judicial review:

> "Mr. Waldie . . . . My disagreement with the approach Mr. Cunningham has taken involves the fact that I believe it runs afoul of the First Amendment to the Constitution. He suggests that the Postmaster General must make a determination as to whether the literature and the materials concerning which he has received a complaint runs afoul of the Supreme Court decision concerning pandering. If he so determines, then the matter being sent through the mail can be prohibited.

> My amendment suggests that should not be the determination of the Postmaster General at all but a determination of the individual who receives the material." 113 Cong. Rec. 28660.

Congressman Cunningham rose to state that he had "no substantive argument" with Congressman Waldie's amendment, while at the same time making it clear that the section as so amended was intended to apply only to sexually-oriented materials. 113 Cong. Rec. 28660-61. There was very little other discussion of the Waldie amendment on the floor of the House, and it passed by a voice vote. 113 Cong. Rec. 28661.

The version of the bill (H.R. 7977) passed by the House was then considered by the Senate Post Office and Civil Service Committee and both Congressmen Cunningham and Waldie appeared to testify. Congressman Cunningham again made it absolutely clear that Section 4009, even after its amendment in the House, was intended to deal solely with sexually related materials. When asked whether he would favor extending the operation of Section 4009 to all third-class mail, Congressman Cunningham replied:

> "No, sir; I will absolutely not be in favor of that . . . .
>
> "The Chairman. . . . The point I am trying to make is I am trying to relate my right, having a box in my home, to what comes in it. If I would like not to get the mail from the loan sharks and from the dance lesson operators and all of these things that come in, would it not be possible to extend it? I think it might strengthen the bill to have a prohibition against this type of thing.
>
> "Mr. Cunningham. No, sir, I would be absolutely opposed to any such extension as that.
>
> * * *

"I see no connection between what I am trying to get across here and the House is trying to get across and what you have just mentioned.

"We are only narrowing it to the moral [sic], obscene, salacious, and sexually provocative mail that comes into our house, nothing else." Hearings on H.R. 7977 before the Committee on Post Office and Civil Service, U. S. Senate, 90th Cong., 1st Sess., pp. 523-24 (hereafter "Senate Hearings").

This testimony by Congressman Cunningham is particularly relevant to the legislative intent underlying Section 4009, because, as Congressman Waldie testified, Cunningham's acceptance of the section as amended was vital to its passage in the House:

"If he [Congressman Cunningham] had sought to oppose the amendment and had opposed it vigorously it would not have been adopted—it is that simple I believe—in the House." Senate Hearings p. 529.

Congressman Waldie, however, went far beyond the remarks he made on the floor of the House when introducing his amendment. He testified that an addressee could "if he is hung up on cabbage . . . prevent the weekly market circular from coming in his house if he is willing to say that cabbage has caused him to become sexually aroused * * * * and it particularly isn't governmentally appealable." Senate Hearings p. 526. Mr. Waldie said that his view was based upon his belief that the First Amendment would bar any review of an addressee's determination as to the character of any particular piece of mailed material. Senate Hearings p. 525.

Mr. Waldie was mistaken. The only First Amendment rights that can be infringed by Section 4009 are

the rights of mailers. Allowing mailers to have administrative and judicial review can only reduce constitutional doubt as to validity of the section. Indeed, other witnesses concluded that without such review significant First Amendment problems would arise—*e.g.*, representatives of the Justice Department and the American Bar Association. Senate Hearings p. 568 and pp. 595-98.

Thus there was conflicting testimony before the Senate Committee both as to whether Section 4009 was intended to be applied to matter other than genuinely pandering advertisements and as to its constitutionality if so applied. In this context, a suggestion was offered by the representative of the Justice Department that if Congress intended Section 4009 to cover non-pandering advertisements certain changes should be made in its language:

> "It [the caption] should no longer refer to pandering advertisements. Moreover, section (a) should be changed so that pandering is not the test that this man is asked to invoke.
>
> "The Chairman. If the bill were modified by striking the title language and striking on line 17, at page 47, the word 'pandering' and adding to the language, if we wish to make it absolutely certain to say 'or otherwise offensive to the recipient to refrain from further mailings.'
>
> "This would certainly make it definitive that the addressee would have the right to ask that mail of a certain nature whatever the cause, whether it was objectionable to him or not, not be delivered any more." Senate Hearings p. 575.

No action was taken on this suggestion, however, and Section 4009 was reported out of committee in precisely the form in which the House had passed it. Sen. Rep.

No. 801, Committee on Post Office and Civil Service, U.S. Senate, 90th Cong., 1st Sess., pp. 37-40 (1967).

The same divergence of views which characterized the testimony to the Senate Committee characterized the subsequent debate on the floor. Senator Monroney stated:

> "By no means do I think that anyone—I repeat, anyone—except the boxholder, in his home, has any control over what the latter considers objectionable . . . ." 113 Cong. Rec. 34231.

Senator Javits disagreed:

> "I believe that the courts will require that the material actually be erotically arousing or sexually provocative and will not let the matter go solely upon the fact that the addressee says it is." *Ibid.*

With these conflicting views as to the scope of review allowed under Section 4009 and the resultant breadth of the statute, the bill passed the Senate 85 to 2. Senator Javits voted for it because it was his "conviction that we are better off this way making the record very clear and posing the issue to the courts and leaving it to them to work out practically." 113 Cong. Rec. 34232.

To summarize: The legislative history of Section 4009 indicates that Congress was concerned solely with sexually provocative "pandering advertisements," and wanted to regulate their dissemination in a manner which would withstand constitutional challenge. On the other hand, that history is patently ambiguous with respect to whether a standard of reasonableness enforced by administrative and judicial review was to apply to that phrase. Under these circumstances, this Court is

free to adopt an interpretation of Section 4009 consistent with constitutional requirements. Indeed, in doing so it would be acting in accordance with Congress' obvious desire to find a constitutional method of regulating sexually provocative advertisements.

CONCLUSION

For the above reasons, this Court should hold that Section 4009 is applicable only to objectively determined "pandering advertisements" and that an independent review is available to enforce this limitation on the statute's scope. So interpreted, Section 4009 is not unconstitutional on its face and the action of the court below in refusing to enjoin its enforcement should be affirmed.

Respectfully submitted,

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